

USAWC STRATEGY RESEARCH PROJECT

**RESTORING THE RULE OF LAW IN POST-WAR IRAQ:  
STEPS, MISSTEPS, AND A CALL TO MAXIMIZE INTERNATIONAL SUPPORT  
FOR IRAQI-LED PROCESSES**

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## ABSTRACT

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When Coalition forces toppled Saddam Hussein's tyrannical regime, they found a formerly democratic legal system crippled by three decades of Ba'athist corruption. Public confidence that justice could be obtained under the law was virtually non-existent. Restoring the rule of law is a precondition for a stable, secure, economically-sound, and democratic Iraq. Extensive reform of judicial, penal, and police institutions is required and has begun.

In addition, those responsible for atrocities and abuses must be purged from power, prosecuted, and punished. Remedies must be developed for victims of persecution by the former regime, including redress for Iraqis forced from their homes to advance Ba'athist political aims. "De-Ba'athification" must also be complemented by some form of "truth and reconciliation" for those who did not commit serious criminal acts, but who benefited from affiliation with the Ba'ath Party.

Coalition and Iraqi interim authorities have initiated processes for prosecutions, resolution of property claims, and the de-Ba'athification of Iraqi society. After an initial unwillingness to cede any real authority, Coalition officials are finally beginning to transfer power to implement rule of law programs to interim Iraqi leaders. However, with few exceptions, significant substantive international participation has not been sought. History teaches that processes of transitional justice succeed when they acquire legitimacy among the affected population and in the eyes of the world community. Such legitimacy can best be achieved when Iraqi-owned processes are supported by international actors. The United Nations and other international organizations have substantial expertise from experience gained in other post-conflict settings. Coalition and interim Iraqi officials should draw heavily on this expertise and experience to help ensure success in reestablishing the rule of law and in the winning the peace in Iraq.



## TABLE OF CONTENTS

ABSTRACT.....	iii
RESTORING THE RULE OF LAW IN POST-WAR IRAQ: STEPS, MISSTEPS, AND A CALL TO MAXIMIZE INTERNATIONAL SUPPORT FOR IRAQI-LED PROCESSES .....	1
<b>BACKGROUND</b> .....	2
OVERVIEW OF THE IRAQI LEGAL SYSTEM.....	2
BA'ATHIST CORRUPTION OF THE IRAQI LEGAL SYSTEM.....	3
<b>INITIAL ACTIONS AND LIMITED INTERNATIONAL INVOLVEMENT</b> .....	3
<b>RETRIBUTIVE JUSTICE</b> .....	5
MAJOR CRIMES OF THE REGIME .....	5
THE DEBATE OVER FORUM .....	5
CREATION OF THE IRAQI SPECIAL TRIBUNAL .....	6
EXPANDING INTERNATIONAL ROLES .....	7
<b>REDRESS FOR ABUSES</b> .....	8
NATURE AND SCOPE OF THE PROBLEM .....	8
ACTIONS OF THE CPA AND GOVERNING COUNCIL TO DATE .....	9
EXPANDING INTERNATIONAL ROLES .....	10
<b>RESTORATIVE JUSTICE</b> .....	11
DE-BA'ATHIFICATION .....	12
REINTEGRATION .....	12
ADDITIONAL INTERNATIONAL ROLES.....	14
<b>RECOMMENDATIONS</b> .....	14
<b>CONCLUSION</b> .....	15
ENDNOTES .....	17
BIBLIOGRAPHY .....	33



## RESTORING THE RULE OF LAW IN POST-WAR IRAQ: STEPS, MISSTEPS, AND A CALL TO MAXIMIZE INTERNATIONAL SUPPORT FOR IRAQI-LED PROCESSES

We achieved the important objective of removing the threat posed by Saddam Hussein by leading a coalition of the willing. Building a new structure of peace requires a wider basis.

— Dr. Henry A. Kissinger

On April 9, 2003, the world witnessed the symbolic demise of the despotic rule of Saddam Hussein as his statue in downtown Baghdad was unceremoniously toppled.<sup>1</sup> A day earlier, President Bush and Prime Minister Blair issued a joint statement announcing the Coalition's objectives for reconstructing the "new Iraq."<sup>2</sup> A primary Coalition goal was to set conditions in which Iraqis could establish "a united, representative government that upholds human rights and the rule of law as cornerstones of democracy."<sup>3</sup> The leaders vowed that in creating this environment the Coalition "will work with its allies, other bilateral donors, and with the United Nations and other international institutions."<sup>4</sup> In an offer of the "olive branch" to the United Nations (UN) and the international community after rancorous disagreement leading up to the Coalition's decision to go to war with Iraq,<sup>5</sup> Bush and Blair proclaimed that "[t]he United Nations has a vital role to play in the reconstruction of Iraq" and called upon "the international community to join with [the Coalition] in ensuring a democratic and secure future for the Iraqi people."<sup>6</sup>

Assessments conducted following the Coalition's military victory revealed an Iraqi legal system riddled with corruption; judicial independence was a relic of history. In addition, legal infrastructure — courts, prisons, and police stations — was decayed or destroyed.<sup>7</sup> Respect for the law was nowhere to be seen. Looters plundered at will and stoplights and traffic police were universally ignored.<sup>8</sup> Public confidence that justice could be obtained under the law was virtually non-existent. Reversing a mindset that developed over thirty-five years of Ba'ath tyranny and convincing Iraqis to re-embrace democratic notions of justice would be no small task. There seemed more than enough work to keep the Coalition, interim Iraqi leaders, the UN, and other governmental and non-governmental organizations (NGOs) very busy in restoring the rule of law in post-Saddam Iraq.

After briefly discussing the history of Iraq's legal system and the corruption occasioned by years of Ba'ath rule, the paper highlights the early reforms initiated by the Coalition and examines why international rule of law roles have thus far been limited. The paper then traces

the steps and, at times, missteps of the Coalition Provisional Authority (CPA)<sup>9</sup> and the later-formed Governing Council of Iraq (Governing Council)<sup>10</sup> as they struggled with challenging rule of law processes. The paper focuses particularly on: (1) prosecuting and punishing Ba'ath leaders responsible for atrocities; (2) providing redress to victims of Saddam's brutal dictatorship, particularly those forced from their homes to advance political objectives; and (3) purging Ba'ath wrongdoers from positions of power, while providing a means of reconciliation for the many who did not commit serious offenses, but who nevertheless benefited from their affiliation with the Ba'ath Party.

The paper identifies specific roles the UN and other international actors are well-suited to play in developing and implementing these critical processes. The paper highlights the extensive transitional justice expertise and experience in the areas under examination and argues that increased international support to these "Iraqi-owned" processes will enhance the likelihood of their success. The paper concludes by urging the CPA and Governing Council not to lose focus of rule of law issues or to miss the opportunity to ensure much needed international help as the scheduled transfer of authority to a new transitional government approaches.

## **BACKGROUND**

### **OVERVIEW OF THE IRAQI LEGAL SYSTEM**

Iraq claims a proud legal heritage. The famous Babylonian Code of Hammurabi provides the earliest known comprehensive body of published law.<sup>11</sup> Notwithstanding its deep historical roots, modern Iraqi jurisprudence is primarily a product of the Ottoman Empire.<sup>12</sup> During the earlier periods of the Ottomans, Islamic law ("Shari-ah") governed Iraq and other Arab lands that formed the Empire. During the nineteenth century, however, the Ottomans, inspired by legal codes of leading western European powers, promulgated major codes to govern commerce, property rights, and civil and criminal law and procedure. These codes remained largely in tact following the post-World War I dismantling of the Ottoman Empire and, as modified by the influences of more recent Egyptian codes, still form a significant part of current Iraqi jurisprudence.<sup>13</sup> Thus, Iraq is characterized as a civil code state, although some vestiges of common law influences from the period of British administration after World War I remain.<sup>14</sup>

While the Ottoman-era codes reflect many reforms from secular European codes, modern Iraqi substantive law largely remains a codification of traditional Islamic law. Indeed, the 1951 Civil Code of Iraq, which remains in force, instructs judges to fill gaps in the codes by referring to principles of Islamic law.<sup>15</sup> Thus, primary sources of modern Iraqi law include

Islamic law, constitutional law, and codified legislation. There are also several recognized “informal” sources of law including customary usage, the opinions of learned jurists, and judicial precedent. However, while these secondary sources may be instructive or persuasive for judges deciding a matter, they have no binding, *stare decisis* effect.<sup>16</sup>

#### **BA'ATHIST CORRUPTION OF THE IRAQI LEGAL SYSTEM**

On July 17, 1968, in a military coup led by members of the Arab Ba'ath Socialist Party (Ba'ath Party), the Revolutionary Command Council (RCC) seized control of the Iraqi government. Two months later, the RCC promulgated a provisional constitution declaring that the Ba'ath Party would govern Iraq through the RCC, exercising both executive and legislative authority. Following his assumption of power in 1979, Saddam Hussein consolidated power as the President and Chairman of the RCC, Prime Minister, and Secretary General of the Regional Command of the Ba'ath Party.<sup>17</sup>

Although the provisional constitution called for an independent judiciary “subject to no other authority save that of the law,”<sup>18</sup> it did not take long before these words began to ring hollow. In a series of decrees and legislative amendments, the RCC created special security and emergency courts that were staffed primarily by Ba'ath Party members who generally lacked legal training. These special courts, including the Revolutionary Court, the State Security Court, and the Special Provisional Court, robbed regular Iraqi courts of large portions of their jurisdiction and soon became potent instruments of regime repression.<sup>19</sup> In addition, the RCC took control of the process of selecting and promoting judges in the regular courts by dissolving the independent Judicial Council and replacing it with the Justice Council, headed by the Minister of Justice, who reported to the president.<sup>20</sup> As a result, Saddam Hussein effectively ensured an Iraqi judiciary that “was not only not independent, but very heavily dependent upon and an organ of the state.”<sup>21</sup>

Those judicial officers, lawyers, and scholars who resisted state interference in judicial affairs generally lost their positions, were exiled, imprisoned, or even killed.<sup>22</sup> Not surprisingly then, Iraqi citizens came to see the judiciary as simply another instrument of the state to protect and preserve the unchecked Ba'ath regime of Saddam Hussein. There was little confidence that the judiciary served and the protected the interests, rights, and freedoms of individual citizens.<sup>23</sup>

#### **INITIAL ACTIONS AND LIMITED INTERNATIONAL INVOLVEMENT**

Recognizing that judicial reform was a precondition for a stable, secure, democratic, and economically-sound Iraq, Coalition authorities quickly embarked on a program “to institute the

rule of law in Iraq to the maximum possible extent.”<sup>24</sup> One of the Coalition’s first priorities was to identify and repeal laws and processes that had been used to trample basic human rights and liberties<sup>25</sup> and take other steps to re-establish public trust in a new legal system that ensured an independent judiciary,<sup>26</sup> impartial law enforcement, and equal protection and fundamental due process under the law.<sup>27</sup> Little international assistance was required to effect these changes, although the CPA, acting as an occupying power,<sup>28</sup> carefully and consistently invoked international law<sup>29</sup> and UN Security Council resolutions as the legal authority for reforms.<sup>30</sup>

Of course, reform of the judiciary and justice system is just one aspect of re-establishing the rule of law in Iraq. Like all societies emerging from brutal dictatorships, Iraq must also come to grips with important transitional justice issues, including retribution for past abuses, redress for victims, and eventual reconciliation. Given the degree of international expertise and the UN’s “comparative advantage” over Coalition authorities because of their perceived independence and impartiality,<sup>31</sup> the international community appeared poised and well-suited to assist Iraqi leaders<sup>32</sup> in developing and implementing these processes. However, despite early promising developments,<sup>33</sup> nearly a year has passed since Bush and Blair called for significant international involvement in the rebuilding process and the CPA, Governing Council, and UN generally have failed to reach consensus regarding specific roles that the international community should play in restoring the rule of law.

There are several reasons why international involvement in rule of law processes has been limited to date. First, rule of law issues have been part and parcel of a continuing debate and disagreement between Coalition partners,<sup>34</sup> among members of the Governing Council,<sup>35</sup> and within the U.S. Government itself<sup>36</sup> regarding how much authority the UN should have in Iraqi post-conflict reconstruction. In addition, shortly after the Security Council established the United Nations Assistance Mission for Iraq (UNAMI) to coordinate the efforts of the international community in Iraqi reconstruction,<sup>37</sup> a terrorist bombing of the UN headquarters in Baghdad killed twenty-three UN workers, including UN Special Representative Sergio Vieira de Mello. Thereafter, the Secretary General withdrew virtually all of the UN’s international staff from Iraq.<sup>38</sup> The continued absence of UN staff and NGOs from Iraq has made greater international participation problematic. Finally, there has been little serious dialogue regarding international involvement in rule of law issues lately because deteriorating security and political developments have forced the CPA, Governing Council, and UN to focus almost exclusively on the political transition scheduled to occur on June 30, 2004.<sup>39</sup> Regardless of the reasons agreements have not yet been reached, the CPA, Governing Council, and UN should immediately seek to define respective roles so that critical transitional justice processes of

retribution, redress, and reconciliation can be advanced in the most efficient, effective, transparent, and legitimate manner possible. The remainder of the paper focuses on these processes and recommends specific international participation.

## **RETRIBUTIVE JUSTICE**

In 1970, shortly after assuming control of Iraq, the RCC's leadership declared full legal immunity for senior regime officials.<sup>40</sup> Armed with this self-proclaimed immunity, Saddam Hussein and his inner circle acted with impunity, heaping more than thirty years of atrocities and abuse on the heads of Iraqis and their neighbors. A bedrock principle for a society founded on the rule of law is that no one is above the law. Holding Saddam and his associates accountable for their many violations of international and domestic law is a critical step in restoring the rule of law in Iraq. Prosecution and punishment of senior regime leaders for genocide, crimes against humanity, war crimes, and other grave offenses sends a clear message of accountability for all offenders, including heads of state, and begins the healing process for millions of the regime's victims.

## **MAJOR CRIMES OF THE REGIME**

The list of the heinous acts committed by Saddam and his henchmen is long and well-documented. It includes the use of poison gas and the summary execution of prisoners of war during the Iran-Iraq War; genocide and the use of chemical weapons in the infamous Anfal campaign against Iraqi Kurds; numerous crimes against humanity and war crimes during the 1990-1991 invasion and occupation of Kuwait; massive killings and torture following the failed uprisings in the north and south after Operation Desert Storm; repression of the Marsh Arabs and Muslim Shi'as; and the forced expulsion of ethnic minorities from their homes as part of the "Arabization" campaign.<sup>41</sup> While there has never been any real question about whether Saddam and others in his regime responsible for these atrocities should be prosecuted and punished, there has been considerable disagreement about the forum in which such proceedings should take place and the role of the international community in the process.

## **THE DEBATE OVER FORUM**

Advocates for a UN-created *ad hoc* tribunal staffed by international judges and prosecutors, akin to those pursuing prosecutions of serious war crimes in the former Yugoslavia and Rwanda,<sup>42</sup> or a "hybrid" tribunal composed of both local and international prosecutors and judges, like the special court set up in Sierra Leone,<sup>43</sup> contend that most Iraqi jurists who remained on the bench were compromised by years of Ba'ath rule and lack the independence to

render justice to officials of the former regime. They also claim that those former Iraqi judges who left or were forced from the bench during Saddam's rule are themselves victims of the regime and could not sit impartially. In addition, proponents of an international model argue that prosecutions of crimes against humanity are extremely complex and that degradation of the judicial system during the Ba'athist reign has left Iraqi judges ill-prepared to deal with such complexities. Finally, they contend that trials conducted by a purely local tribunal would give the appearance of being mere "show trials" whose judgments would not be viewed as legitimate by the world community.<sup>44</sup>

Countering these arguments, proponents for a national tribunal contend that Iraqis have borne the brunt of the former regime's crimes and should control the prosecutions. Indeed, they note that the charter for the International Criminal Court<sup>45</sup> expresses a preference for local control of trials, declaring that trials should be "internationalized" only when the local country is unwilling or incapable of conducting them.<sup>46</sup> They indicate that Iraqis are certainly willing to conduct the trials and strongly dispute the contention they are incapable, noting that with some training and assistance, Iraqi jurists will be up to the task.<sup>47</sup> In addition, they fear that, like the former Yugoslavian tribunal, an international proceeding could be held in a foreign venue in a foreign tongue, depriving most Iraqis of the long-awaited opportunity to witness Saddam and his cronies brought to justice. Citing the prosecutions in the former Yugoslavia and Rwanda, they also note that international tribunals have proved to be slow, cumbersome, and costly.<sup>48</sup>

#### CREATION OF THE IRAQI SPECIAL TRIBUNAL

The arguments advanced by proponents for an Iraqi-run tribunal generally carried the day. On December 10, 2003, CPA Administrator Bremer delegated authority to the Governing Council to establish the Iraqi Special Tribunal (IST or Tribunal).<sup>49</sup> The CPA reserved authority to modify the Tribunal statute in the "interests of security." The delegation also mandates adherence to at least minimal international standards of justice and authorizes, but does not require, non-Iraqis to be appointed as Tribunal judges.<sup>50</sup> The same day, the Governing Council enacted The Statute of the Iraqi Special Tribunal.<sup>51</sup>

The statute gives the Tribunal jurisdiction over certain crimes committed by Iraqi nationals between July 17, 1968 and May 1, 2003. The enumerated offenses include genocide, crimes against humanity, and war crimes, as well as three categories of crimes recognized under existing Iraqi law – manipulating the judiciary, wasting or squandering public assets and funds, and pursuing policies leading to war against an Arab country. The statute expressly abrogates all immunity and eliminates any statute of limitations for the listed offenses.<sup>52</sup>

Under the statute, trials will be conducted before five-judge panels, with judgments rendered based on a simple majority. Decisions of the Trial Chambers are reviewable by a nine-member Appeals Chamber. The President of the Appeals Chamber serves as the President of the Tribunal and is required to draft rules of procedure and evidence to govern trials. The statute also directs the Governing Council to appoint investigative judges to gather evidence and issue subpoenas, warrants, and indictments, and independent prosecutors to take the cases to trial.<sup>53</sup>

In an attempt to assuage those supporting an *ad hoc* international or hybrid tribunal, the statute authorizes the Governing Council, “if it deems necessary,” to appoint experienced non-Iraqi judges to the trial and appellate panels.<sup>54</sup> In addition, the statute requires the appointment of non-Iraqi nationals to advise and observe the work of the investigative judges, prosecutors, and trial and appellate judges to ensure adherence to internationally-accepted notions of due process and proper application of international law. The statute provides that in selecting these non-Iraqi experts, tribunal authorities may “request assistance from the international community, including the United Nations.”<sup>55</sup> While the statute requires that a suspect’s principal lawyer be an Iraqi, international counsel may augment the defense team.<sup>56</sup>

#### EXPANDING INTERNATIONAL ROLES

Although some international roles are mandated by the IST statute, other potential involvement is discretionary. For several reasons, the CPA and Governing Council should maximize international participation generally and specifically should appoint non-Iraqi judges to trial and appellate panels. First, there are significant international equities. Over several years, UN agencies and other international organizations have devoted significant resources and energy collecting, analyzing, and preserving evidence of atrocities committed by officials of Saddam’s regime.<sup>57</sup> In addition, many of the victims of Ba’athist atrocities are non-Iraqis.<sup>58</sup> By appointing international jurists—particularly from neighboring Arab countries—to serve beside Iraqi judges in the IST, the Governing Council would send a clear message that Iraqis recognize the international reach of Saddam’s tyranny. Concerns that adding international judges would be viewed by Iraqi jurists as a lack of confidence in their abilities<sup>59</sup> would be ameliorated by retaining a majority of Iraqi judges in all trial and appellate chambers. Whatever minor ego bruises Iraqi judges might experience would be more than compensated by the added expertise, transparency, credibility, neutrality, and legitimacy that the presence of international judges would bring.

In addition, as experience has shown, the costs in prosecuting leaders of deposed regimes for serious international crimes can be astronomical.<sup>60</sup> Currently, all expenses of the IST are to be borne by the "regular budget of the Government of Iraq."<sup>61</sup> The international community reasonably could be expected to bear a share of these costs commensurate with the degree of their participation in the process. Savings realized as a result of international funding could be used to finance victims' compensation programs. Finally, assuming the death penalty is an available punishment, many talented international experts may decline the invitation to participate in the process, even as advisors and observers.<sup>62</sup> By enhancing the roles allocated to international participants, the CPA and Governing Council should be able to persuade capable and qualified experts, even those with a general opposition to capital punishment, to assist. Maximized international participation in an Iraqi-controlled process is the best means to achieve legitimate national and international objectives.

### **REDRESS FOR ABUSES**

Providing redress through legal processes to the victims of the tyranny of Saddam's Ba'athist regime is also an important element of the process of re-establishing the rule of law in post-conflict Iraq. Even remedies that fall short of a "make-whole" standard can go far to restore in victims a conviction that justice may be obtained under the law. The existence of credible legal processes for redress also dissuades victims from seeking extrajudicial methods of redress or revenge. While many suffered unjustly, some of the most victimized by Saddam's regime were those forced from their homes in order to further Ba'athist policies and political objectives. These expulsions have resulted in a large number of refugees and internally displaced persons (IDPs).<sup>63</sup>

### **NATURE AND SCOPE OF THE PROBLEM**

Although the number of displaced Iraqis has been difficult to ascertain, a comprehensive report issued in 2002 estimates there have been between 600,000 to 800,000 forced displacements in northern Iraq and up to 300,000 in central and southern Iraq.<sup>64</sup> The northern displacements generally involved a series of distinct but overlapping phases or programs. First, in the 1970s and 1980s, the Baghdad regime destroyed an estimated 4,000 Kurdish villages in an effort to subdue an independence-minded rural Kurdish population.<sup>65</sup> Then, beginning in 1988, the regime escalated attacks on the Kurds in the infamous al-Anfal ("spoils of war") campaign that included mass genocide and the use of chemical and other weapons of mass destruction.<sup>66</sup> Next, following the short-lived, U.S.-encouraged Kurdish uprising after the 1991 Gulf War, thousands of Kurds fled or attempted to flee to Iran and Turkey to escape the

expected Baghdad retaliation.<sup>67</sup> Finally, thousands of Kurds, Turkmen, Assyrian Christians, and other ethnic and religious minorities were displaced from the oil-rich Kirkuk region and from the strategically important area between Sinjar and the Syrian border through state-sponsored discrimination and repression that came to be known as “Arabization.”<sup>68</sup>

In central and southern Iraq, thousands of opponents of the former regime were also forced from their properties, including both majority Shi’a Muslims who were expelled for what was considered pro-Iranian political activity and the so-called “Marsh Arabs” who fled fighting during the Iran-Iraq war or who were targeted following the unsuccessful southern uprising after Iraq’s defeat in Operation Desert Storm.<sup>69</sup> Among other things, the campaign against the Marsh Arabs included raids to destroy villages, assassination and abduction of Shi’a leaders, and projects to divert traditional water sources and drain marshlands.<sup>70</sup>

#### ACTIONS OF THE CPA AND GOVERNING COUNCIL TO DATE

Following the swift defeat of Saddam’s forces by the Coalition, many displaced and exiled Iraqis sought to return to their homes and reclaim lands and property they had formerly occupied. In some cases, these re-occupations were aided by armed Kurdish militia (“*pesh merga*”).<sup>71</sup> The Coalition recognized that these self-help measures could result in violent altercations, as well as the secondary displacement of the pre-war occupants. Consequently, Coalition authorities implemented a policy designed to preserve the pre-war status quo and defer the resolution of property disputes until formal legal processes could be established.<sup>72</sup>

Notwithstanding the Coalition’s “stay put” policy and even the occasional eviction by Coalition forces of ethnic minorities who had taken resettlement into their own hands,<sup>73</sup> recent estimates suggest that approximately 30,000 Kurds returned to their original homes, resulting in the secondary displacement of over 100,000 primarily Arabs.<sup>74</sup> The return of Kurds to flashpoint areas, particularly in and around Kirkuk, has also resulted in deadly confrontations.<sup>75</sup>

In January 2004, the CPA and Governing Council took several important steps to deal with IDPs, refugees, and property claims issues.<sup>76</sup> First, the CPA established the Ministry of Displacement and Migration (MODM) to develop and implement policies regarding repatriation, relocation, and resettlement of IDPs and refugees and to provide assistance to non-Iraqi refugees in Iraq. The MODM was also designated as the focal point to coordinate with the UN High Commissioner for Refugees (UNHCR), the International Organisation for Migration (IOM), and other agencies and NGOs working with IDPs and refugees.<sup>77</sup>

In addition, the CPA delegated authority to the Governing Council to establish the Iraq Property Claims Commission (IPCC), which the Council did by promulgating a statute on

January 15, 2004.<sup>78</sup> The IPCC consists of regional commissions in each of Iraq's eighteen governorates and an Appellate Division composed of five judges with property dispute experience. Although the IPCC is a national program, the enabling statute allows regional commissions to seek assistance from other governmental and non-governmental actors and specifically authorizes the assistance of persons "who are experts on the subject of the claim."<sup>79</sup> The statute also provides general principles to resolve claims. For example, the original owner would normally be required to compensate a subsequent buyer in due course for improvements made by the buyer.<sup>80</sup> To minimize secondary displacement impacts, the statute entitles individuals who are evicted as a result of IPCC decisions to resettlement costs, available state land, or compensation from the MODM.<sup>81</sup> The legislation also directs the Governing Council to issue additional guidelines and procedures to be followed by the IPCC. Claims to the IPCC must be filed by December 31, 2004. Claims filed after the deadline will be heard by regular Iraqi courts.<sup>82</sup>

#### EXPANDING INTERNATIONAL ROLES

There are a number of reasons why the CPA and Governing Council should seek greater international involvement in resolving claims of victims of Saddam's displacement policies. First, UN agencies and several NGOs have a wealth of data regarding Iraqi IDPs acquired during their pre-war work in Iraq under the Oil-for-Food program.<sup>83</sup> Since regime collapse, the IOM has also been involved in identifying and registering the primarily Arab IDPs displaced by the return of the original owners to their former homes.<sup>84</sup> Much of this information could be very valuable to the IPCC in setting up efficient claims processes (e.g., knowing the numbers and locations of IDPs) and in resolving claims (e.g., knowing whether a particular claimant was displaced as a result of Arabization or by inter-Kurd fighting). Moreover, various UN organizations and relief agencies were involved in constructing thousands of housing units for Iraqi IDPs and could provide important information concerning property values and construction and relocation costs in different parts of Iraq.<sup>85</sup>

In addition to providing critical IDP and property information, international actors can also share valuable lessons learned from other international property dispute resolution endeavors. Expertise gained by the UN and international adjudicators in establishing and administering the Kosovo Housing and Property Directorate (HPD) and Housing and Property Claims Commission (HPCC)<sup>86</sup> would be of particular value since there are a number of issues encountered in Kosovo that the IPCC will have to face.<sup>87</sup> Engaging the HPD and HPCC to learn how they dealt

with these challenges undoubtedly will help the IPCC find efficient solutions and avoid potential pitfalls.<sup>88</sup>

There are also a number of practical reasons to invite and encourage greater international involvement in the process of resolving property claims. For example, in volatile areas like Kirkuk, the more that individuals who have no stake in the outcome are involved, the more likely the ultimate resolution of competing claims will be viewed as fair and legitimate, thus reducing the possibility of violence and continued strife. In addition, the Coalition is expressly seeking international donations to help fund the claims resolution process.<sup>89</sup> International donors will be more likely to contribute if given meaningful roles in the process. Moreover, because of the inherent humanitarian issues associated with these property disputes, the UN and other aid organizations likely can be induced to return to Iraq notwithstanding ongoing security concerns if they are offered opportunities to make substantive contributions to the process.<sup>90</sup>

## **RESTORATIVE JUSTICE**

Restoration of the rule of law in post-conflict Iraq will not end after Ba'athists who committed horrific crimes are brought to justice or even when victims of Saddam's despotic brutality have obtained a measure of redress. Currently, a dark cloud hangs over an estimated 1.5 to two million Iraqis who were affiliated to one degree or another with the Ba'ath Party prior to the regime's fall;<sup>91</sup> some already have been subjected to violent revenge.<sup>92</sup> To be sure, there were many, particularly senior leaders and members of the regime's security apparatus, who committed heinous acts and merit the full measure of retributive justice. Others, including mid-level officials who were required to demonstrate their loyalty to the regime by trampling the rights of others, committed less serious criminal offenses or acts of abuse and intimidation. Their misdeeds warrant appropriate criminal penalties or other non-criminal sanctions. However, there are also a very large number of lower-ranking Party members who did not commit offenses and were not wed to Ba'ath ideology, but who affiliated with the Party to advance education and career opportunities or to obtain other benefits only available with Party association.<sup>93</sup> Justice requires that these pragmatic, opportunistic Ba'athists be stripped of their perks and advantages.

Restorative justice should consist of complementary processes of purging and reintegration. The former process involves removing from public and private institutions and Iraqi society generally pernicious Ba'athist influences. In many cases, this purging requires the removal of former Ba'athists from positions of influence. Modeled after the post-World War II

de-Nazification of Germany,<sup>94</sup> this purging process, that has come to be known as “de-Ba’athification,” is well underway, at least in the public sector.

#### DE-BA’ATHIFICATION

On May 16, 2003, as one of his first orders as head of the CPA, Administrator Bremer directed the disestablishment of the Iraqi Ba’ath Party,<sup>95</sup> removed all “senior members”<sup>96</sup> from public sector positions, and barred all “full members” from serving in any of the top three layers of management in national ministries or in other government institutions like universities and hospitals. Bremer’s order also directed authorities to investigate individuals subject to removal from government posts for prior criminal conduct. The CPA reserved authority to make exceptions to the employment bans on a case-by-case basis.<sup>97</sup>

Later, the Governing Council, apparently acting independently of the CPA, established the Higher National De-Ba’athification Commission (HNDC). In a subsequent CPA order, Administrator Bremer acknowledged the HNDC’s creation, ratified actions it had taken, and delegated HNDC the authority to implement de-Ba’athification consistent with prior CPA pronouncements. The order also provided due process rights for civil servants subject to removal for former Ba’ath affiliation, including pre-termination notice and an opportunity to present evidence and argument, as well as post-termination appeal and review rights. The CPA also granted the Governing Council authority to establish additional implementing guidance and procedures, including special rules for particular professions or categories of employees.<sup>98</sup>

On January 11, 2004, the Governing Council issued the HNDC’s implementing instructions. The guidance generally followed earlier CPA directives, although it afforded new appeal rights to the lowest ranking “full members” (“Firqah”), authorized judicial appeal of decisions by the HNDC sustaining removals, and granted pensions to some low-level former Party members whose employment was terminated. The Governing Council also announced that guidance for de-Ba’athification of trade associations and certain private sector organizations would be forthcoming.<sup>99</sup>

#### REINTEGRATION

Once former Ba’athists have paid an appropriate penalty commensurate with the degree of their culpability, they must have the ability to reintegrate into society and pursue equal opportunity under the law. To date, however, the CPA and Governing Council have not proposed a reconciliation process, apparently waiting until prosecutions and programs to redress victims are underway.<sup>100</sup> While this hesitancy is understandable, it may be shortsighted. Although the processes of retribution, redress, and reconciliation may end up occurring more or

less sequentially, the likelihood of achieving the overall objectives will be increased by having a comprehensive, integrated, and complementary strategy at the outset.<sup>101</sup>

Perhaps the greatest challenge will be the reintegration of the tens or hundreds of thousands of former Ba'athists<sup>102</sup> who were responsible for abuse and persecution and committed acts that constitute misdemeanors under Iraqi law. Clearly, neither the IST nor the regular Iraqi criminal courts can resolve the potential volume of these cases in any reasonable time period, thus delaying and frustrating justice and inviting extrajudicial "score settling." There are many models Iraq's governing authorities can consider to deal with these cases, including truth committees, truth and reconciliation commissions, lustration, and partial or conditional grants of amnesty.<sup>103</sup> One possible model was proposed by the Iraqi Jurists' Association (IJA), a group primarily composed of expatriate lawyers, judges, and law professors, and the Working Group on Transitional Justice in Iraq.<sup>104</sup> However, like most of the work done under the umbrella of the Future of Iraq Project, this proposal has not received serious attention from Baghdad authorities.<sup>105</sup>

The IJA advocates the creation of amnesty and reconciliation committees to resolve the multitude of potential misdemeanor cases.<sup>106</sup> Under the IJA's proposal, each committee would consist of three members, headed by a judicial officer. Generally, the committees' jurisdiction would be limited to misdemeanors confessed within a one-year amnesty period. In addition, the committees could act in more serious criminal matters in cases where, consistent with tenets of Islamic law, the victim and the victim's family agree to relinquish their rights against the perpetrator as an act of forgiveness that involves the perpetrator compensating the victims for their injuries and damages.<sup>107</sup>

Consistent with existing Iraqi criminal law regarding immunity, the perpetrator must make a full and truthful confession and fully cooperate with investigators by identifying other wrongdoers. The draft law also requires the person seeking amnesty to agree to accept the punishment of the committee, make a public apology, and pledge not to commit future offenses. If the accused fails to comply with all the conditions for amnesty, the matter could be referred to the public prosecutor for investigation and prosecution in a court of competent jurisdiction.<sup>108</sup>

In the IJA proposal, the amnesty and reconciliation committees have broad latitude to fashion appropriate punishments, including ordering the accused to make a personal payment to the victim and perform prescribed community service for a period of up to one year. Decisions of the committees may be reviewed by appropriate appellate courts. To ensure that future generations would be reminded of the dark Ba'ath era, all crimes would be entered into a public registry and appropriate memorials created for victims.<sup>109</sup>

The IJA model, developed with international assistance, has considerable appeal. It recognizes that international crimes and serious domestic offenses must be prosecuted, but strikes a pragmatic balance between the need for accountability with the realities of the judicial capacity to handle the volume of potential lesser-offense cases. Unlike many other reconciliation processes, the IJA's plan extensively incorporates existing national law and cultural norms.<sup>110</sup> In addition, it makes full and voluntary confession a precursor to any amnesty and recognizes the rights of victims to compensation for injuries. It also provides for appropriate lustration mechanisms to ensure transparency and awareness of individual wrongdoing, now and in the future.

#### **ADDITIONAL INTERNATIONAL ROLES**

Although there are examples of truth and reconciliation processes sponsored, financed, and operated by the UN and other international organizations,<sup>111</sup> reconciliation—more than any other rule of law process—requires national “ownership” to succeed. However, given the vast experience and expertise developed in the international community in the past thirty years with various reconciliation models, international experts could provide valuable advice and assistance in determining whether the IJA model or some other variation should be adopted in Iraq and in determining how best to incorporate both Iraqi and international norms. They could also advise and assist in drafting enabling documents and setting up databases and registries. In addition, international experts could conduct training for investigators, commissioners, and jurists involved in the process.<sup>112</sup> Moreover, international assistance could be sought to finance these undertakings.

#### **RECOMMENDATIONS**

In order to enhance effectiveness, efficiency, transparency, and legitimacy in each of the foregoing rule of law processes, the CPA and Governing Council should take the following specific actions:

##### **Prosecutions –**

- Appoint one or more international judges (but not a majority) to sit on the trial and appellate tribunals created by the IST statute
- Consult with the UN and international experts to identify qualified experts to serve as advisors and observers in preparing and taking cases to trial before the IST
- Request international assistance in drafting IST rules of procedure and evidence to ensure compliance with internationally-accepted norms

- Request international training assistance for judges, prosecutors, and support staff of the IST
- Seek commitments for funding of the IST process commensurate with the degree of international participation
- Engage ICTFY prosecutors, judges, and administrative staff and other experts familiar with ICTFY procedures to review lessons learned in prosecuting deposed state leaders, managing case loads, etc.

#### **Property Claims –**

- Amend the IPCC's chartering documents to add qualified international advisors and observers to IPCC staffs
- Request relevant UN agencies and NGOs to share information regarding IDP property claims with the IPCC
- Seek expert information from UN agencies and NGOs on property values and construction and resettlement costs
- Engage commissioners and support staff from the Kosovo HPD and HPCC to capture lessons learned
- Coordinate with relevant UN agencies and NGOs to ensure linkage between the resolution of claims and the resettlement of IDPs and refugees
- Seek commitments for funding of the IST process commensurate with the degree of international participation

#### **Truth and Reconciliation –**

- Adopt the IJA proposal for reconciliation or explore with international experts alternative models
- Request international assistance in drafting enabling documents and rules governing procedures and evidence
- Request training assistance from qualified international experts for Iraqi investigators, commissioners, judges, and staff involved in whatever reconciliation mechanisms are adopted
- Seek commitments for funding of reconciliation processes commensurate with the degree of international participation

### **CONCLUSION**

Currently, national and international attention is focused almost exclusively on the political transition of sovereignty. Very little consideration is being given to outstanding rule of law

issues. While this focus is driven by political expediencies and pre-established deadlines, it may, in some cases, put the proverbial cart before the horse. For example, it is difficult to imagine how orderly voter registration and elections in critical cultural flashpoints like Kirkuk can occur until there is a general agreement on disputed property claims in the area. In addition, such an orientation may be myopic. As Paddy Ashdown, the former UN High Representative in Bosnia noted:

In Bosnia, we thought that democracy was the highest priority and we measured it by the number of elections we could organize. In hindsight, we should have put the establishment of rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, and public confidence in police and courts. We should do well to reflect on this as we formulate our plans for Afghanistan, and perhaps, Iraq.<sup>113</sup>

Referring to the current situation in Iraq, Middle East expert Anthony Cordesman has similarly cautioned: "There is far too much talk about democracy in the narrow sense of elections, and far too little talk about the role of the separation of power and rule of law."<sup>114</sup>

In the time remaining before authority transfers to a new transitional government, the CPA and Governing Council should actively re-engage the UN and international community to enhance nascent rule of law processes. Coalition forces have sacrificed too much to let this opportunity pass. Iraqi citizens, who have suffered so much for so long, deserve no less.

WORD COUNT= 6210

## ENDNOTES

<sup>1</sup> Joanne Ostrow, "Lasting Images: Tumbling Statue Immediately Burns into Memory," *Denver Post*, 10 April 2003, sec. A, p. 5 (765 words) [database on-line]; available from Westlaw; accessed 23 January 2004.

<sup>2</sup> President George W. Bush and Prime Minister Tony Blair, "Joint Statement on Iraq's Future," 8 April 2003; available from <http://www.whitehouse.gov/news/releases/2003/04/20030408-1.html>; Internet; accessed 18 February 2004.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Statements of representatives of forty-seven countries during UN debate on March 11 and 12, 2003, provide a flavor for the significant discord and disagreement within the international community on the question of using force to compel Iraqi compliance with prior UN mandates. United Nations Security Council, *The Situation Between Iraq and Kuwait*, 4717<sup>th</sup> meeting, S/PV.4717 and Resumption 1, 11-12 March 2003, available from <http://daccess-ods.un.org/TMP/9297413.html> and <http://daccess-ods.un.org/TMP/3480216.html>; Internet; accessed 9 March 2004.

<sup>6</sup> Bush and Blair.

<sup>7</sup> See United Nations and World Bank, *Joint Iraq Needs Assessment*, October 2003, 47, available from <http://www.ig.undp.org/UN-WB-IraqNeeds.pdf>; Internet; accessed 19 December 2003. See also Jim Edwards, "From the Ground Up," *New Jersey Law Journal*, 20 October 2003 [journal on-line], available from <http://www.blankrome.com/Publications/Articles/ORLFSKY10.20.03.pdf>; Internet; accessed 19 December 2003.

<sup>8</sup> Mark Beach, "Destruction in City, Death in the Street: A Reporter's Diary," *Lancaster (PA) New Era*, 25 May 2003 (1923 words) [database on-line]; available from Westlaw; accessed 9 March 2004.

<sup>9</sup> Administrator L. Paul Bremer was appointed on May 13, 2003, to head the newly-created Coalition Provisional Authority. The CPA assumed responsibility for administering post-conflict Iraq from the Office of Reconstruction and Humanitarian Assistance, which had been headed by LTG (Ret) Jay Garner. Congress, House of Representatives, Committee on International Relations, *United States Policy Toward Iraq: Hearings before the Committee on International Relations*, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., 15 May 2003, 8. The CPA exercises the temporary powers of government in post-war Iraq. See Coalition Provisional Authority, Regulation Number 1, "The Coalition Provisional Authority," 16 May 2003; available from [http://www.cpa-iraq.org/cpa\\_documents.html](http://www.cpa-iraq.org/cpa_documents.html); Internet; accessed 21 January 2004.

<sup>10</sup> The Governing Council was formally established by CPA Administrator Bremer on July 13, 2003, to act "as the principal body of the Iraqi interim administration, pending the establishment of an internationally recognized, representative government by the people of Iraq, consistent with [U.N. Security Council] Resolution 1483." Coalition Provisional Authority, Regulation Number 6, "Governing Council of Iraq," 13 July 2003; available from [http://www.cpa-iraq.org/cpa\\_documents.html](http://www.cpa-iraq.org/cpa_documents.html); Internet; accessed 21 January 2004. For its part, the UN Security Council formally recognized the Governing Council and its ministers as "the principal bodies of the Iraqi interim administration . . .". United Nations, UN Security Council Resolution 1511, 16

October 2003; available from <http://daccess-ods.un.org/TMP/5711358.html>; Internet; accessed 9 March 2004.

Although the regulation establishing the Governing Council provides that the CPA and Governing Council are mutually to “consult and coordinate on all matters involving the temporary governance of Iraq,” (Coalition Provisional Authority, Regulation Number 6, sec. 2 (1)), the CPA exercises ultimate authority and veto power over Governing Council actions. See Maggie Farley, “Delegation from U.S.-Backed Iraqi Council Welcomed to U.N.,” *Los Angeles Times*, 23 July 2003, sec. A, p. 10 (884 words) [database on-line]; available from Westlaw; accessed 9 March 2004.

<sup>11</sup> S.H. Amin, “The Legal System of Iraq,” in vol. 5 of *Modern Legal Systems Cyclopedia*, ed. Kenneth Robert Redden (Buffalo: William S. Hein & Co. 1990), sec. 1.2.

<sup>12</sup> Ibid., sec. 1.3.

<sup>13</sup> Ibid., secs. 1.2-1.3, 1.5; Feisal al-Istrabadi, “The New Iraq: Online NewsHour Special Report,” interview with Gwen Ifill, (May 13, 2003), transcript available from [http://www.pbs.org/newshour/bb/middle\\_east/jan-june03/iraq\\_05-13.html](http://www.pbs.org/newshour/bb/middle_east/jan-june03/iraq_05-13.html); Internet; accessed 13 January 2004.

<sup>14</sup> Amin, sec. 1.4.

<sup>15</sup> See ibid., sec. 1.5. In addition, the interim constitution adopted by the Governing Council on March 8, 2004, to become effective on June 30, 2004, provides that Islam is “to be considered a source of legislation,” and that no law may be enacted “that contradicts the universally agreed tenets of Islam.” Governing Council of Iraq, *Law of Administration for the State of Iraq for the Transitional Period*, 8 March 2004, art. 7; available from <http://www.cpa-iraq.org/government/TAL.html>; Internet; accessed 9 March 2004.

<sup>16</sup> Amin, sec. 1.5.

<sup>17</sup> Department of State, *Iraq: 2002 Country Reports on Human Rights Practices* (Washington, D.C.: U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, 31 March 2002); available from <http://www.state.gov/g/drl/rls/hrrpt/2002/18277.htm>; Internet; accessed 13 January 2004.

<sup>18</sup> See Gisbert H. Flanz, Fouad Fahmy Shafik, and Kerry M. Boyle, *Iraq*, vol. 9, *Constitutions of the Countries of the World*, eds. Albert P. Blaustein and Gisbert H. Flanz, trans. Fouad Fahmy Shafik (Dobbs Ferry, NY: Oceana Publications, Inc., 1990), 35.

<sup>19</sup> Robert Perito, *Establishing the Rule of Law in Iraq: Special Report 104* (Washington, D.C.: United States Institute of Peace, April 2003), 35; available from <http://www.usip.org/pubs/specialreports/sr104.html>; Internet; accessed 23 January 2004.

<sup>20</sup> Working Group on Transitional Justice in Iraq and Iraqi Jurists' Association, *Transitional Justice in Post-Saddam Iraq: The Road to Re-establishing Rule of Law and Restoring Civil Society – a Blueprint*, March 2003, 21; available from <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/85256a1c006ac77385256d2b0054e3b2?OpenDocument>; Internet; accessed 24 October 2003 (hereafter cited as “Blueprint”).

<sup>21</sup> al-Istrabadi, "The New Iraq."

<sup>22</sup> Khaled Abou el Fadl, "The New Iraq: Online NewsHour Special Report," interview with Gwen Ifill, (May 13, 2003), transcript available from [http://www.pbs.org/newshour/bb/middle\\_east/jan-june03/iraq\\_05-13.html](http://www.pbs.org/newshour/bb/middle_east/jan-june03/iraq_05-13.html); Internet; accessed 13 January 2004.

<sup>23</sup> Blueprint, 4.

<sup>24</sup> Coalition Provisional Authority Senior Advisor to the Ministry of Justice Donald F. Campbell, "Ministry of Justice National Policy Guidance," memorandum for all Coalition Provisional Authority officials with responsibility for matters relating to the Ministry of Justice, 1, Baghdad, Iraq, 26 June 2003; available from <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/2ed78f171710693885256d5e004c0159>; Internet; accessed 24 October 2003.

<sup>25</sup> Among other things, the CPA abolished the special security courts that had been established to punish enemies of the former regime without due process, suspended portions of the penal code that had been used by the Ba'ath regime as tools of repression, and modified other parts of the penal code to strengthen internal security and stability. Coalition Provisional Authority, Order Number 2, "Dissolution of Entities," 23 May 2003, Annex; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 22 January 2004; Coalition Provisional Authority, Order Number 7, "Penal Code," 10 June 2003; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 22 January 2004; Coalition Provisional Authority, Order Number 31, "Modifications of Penal Code and Criminal Proceedings Law," 10 September 2003; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 22 January 2004.

<sup>26</sup> Among its early reforms, the CPA re-established the Council of Judges which, prior to its dissolution by Saddam Hussein, had overseen the appointment of judges and public prosecutors based on merit and integrity, and also established a Judicial Review Committee to examine the suitability of sitting judges and prosecutors to retain office. Additionally, the CPA established a new Central Criminal Court of Iraq to hear especially serious cases and serve as a model of procedural fairness and judicial integrity. Coalition Provisional Authority, Order Number 35, "Re-Establishment of the Council of Judges," 13 September 2003; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 22 January 2004; Coalition Provisional Authority, Order Number 15, "Establishment of the Judicial Review Committee," 23 June 2003; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 22 January 2004; Coalition Provisional Authority, Regulation Number 13 (Revised), "The Central Criminal Court of Iraq," 11 July 2003; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 22 January 2004.

<sup>27</sup> See Coalition Provisional Authority Order Number 31, "Modifications of Penal Code and Criminal Proceedings Law"; Coalition Provisional Authority, Memorandum Number 3, "Criminal Procedures," 18 June 2003; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 22 January 2004.

<sup>28</sup> Although Coalition authorities doggedly preferred to be recognized as "liberators" rather than "occupiers," see Rick Atkinson, *In the Company of Soldiers: A Chronicle of Combat* (New York: Henry Holt & Co., 2004), 287, an occupation occurs when territory is placed under

the authority of a hostile army, whether or not that hostile army declares an occupation. See *Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulation Concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907 (hereafter cited as "Hague IV"), Annex, sec. III, art. 42. In UN Security Council Resolution 1483, the international community recognized the legal fact of Coalition occupation of Iraq. United Nations, UN Security Council Resolution 1483, 22 May 2003, available from <http://daccess-ods.un.org/TMP/7763856.html>; Internet; accessed 22 January 2004, 2. Occasionally, Coalition officials have publicly acknowledged the legal reality. See L. Paul Bremer, Coalition Provisional Authority Administrator, "Address to the Iraqi People," 21 November 2003, available from [http://www.cpa-iraq.org/transcripts/20031121\\_Nov-21-Bremer-Address.htm](http://www.cpa-iraq.org/transcripts/20031121_Nov-21-Bremer-Address.htm); Internet; accessed 22 January 2004 ("the occupation will end at the end of June 2004").

<sup>29</sup> The responsibilities, obligations, and rights of occupying powers are primarily outlined in the Annexed Regulations to Hague Convention IV of 1907 and the Fourth Geneva Convention of 1949. See Hague IV, Annex, sec. III, arts. 42-56; *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949 (hereafter cited as "Geneva IV"), pt. III, sec. III, arts. 47-78. Among other things, the relevant conventions require an occupying power to "take all measures in his power to restore, and ensure, as far as possible, public order and safety." Hague IV, Annex, sec. III, art. 43. Generally, an occupying power must preserve existing law and government institutions. *Ibid*; Geneva IV, pt. III, sec. II, art. 47. Laws that are political, inconsistent with the maintenance of public order, discriminatory, or otherwise inconsistent with human rights may be repealed or amended and new regulations promulgated by occupying authorities. Michael M. Schmitt, "Law of Belligerent Occupier," *Crimes of War Project*, 15 April 2003, available from <http://www.globalpolicy.org/security/issues/iraq/attack/law/2003/0415bell.htm>; Internet; accessed 23 January 2004. In addition, an occupying power may take such measures necessary to ensure security and maintain orderly administration of the occupied territory, including establishing criminal courts, detaining individuals, and removing or replacing judges and other public officials. See Geneva IV, pt. III, sec. II, arts. 54, 64.

<sup>30</sup> In each of the over eighty regulations, orders, and memoranda issued to date, the CPA consistently has cited relevant Security Council resolutions and the laws and usages of war as its basis of authority. See Coalition Provisional Authority, Official Documents, (2003-2004), available from [http://www.cpa-iraq.org/cpa\\_documents.html](http://www.cpa-iraq.org/cpa_documents.html); Internet; accessed 5 March 2004.

<sup>31</sup> United Nations Secretariat, *Report of the Secretary-General pursuant to paragraph 24 of Security Council resolution 1483 (2003)*, 17 July 2003, par. 109; available from <http://daccess-ods.un.org/TMP/9913737.html>; Internet; accessed 21 January 2004 (hereafter cited as "UN Report of 17 July").

<sup>32</sup> Initially, Coalition officials were very reluctant to give up substantive authority on important issues to the Governing Council. See Howard LaFranchi, "New Fast Track for Iraqi Sovereignty," *Christian Science Monitor*, 17 November 2003, sec. A, p. 1 (1171 words) [database on-line]; available from Westlaw; accessed 9 March 2004; Patrick Cockburn, "Iraq Six Months On: From Triumph Has Sprung Murderous Fiasco – Ignoring Iraqis Comes with a Terrible Price," *Independent* (London), 10 October 2003, sec. A, p. 3 (1289 words) [database on-line]; available from Westlaw; accessed 9 March 2004. More recently, however, the CPA has delegated significant responsibilities to the Council, including authority to establish a tribunal to prosecute Iraqis accused of war crimes and crimes against humanity, a claims commission to receive and resolve real property claims arising from Ba'athist policies and

forced relocations, a public integrity commission to enforce anti-corruption laws and ethical standards for public employees, and a de-Ba'athification commission to purge the government and elements of society of Ba'athist leaders and influences. Coalition Provisional Authority, Order Number 48, "Delegation of Authority Regarding an Iraqi Special Tribunal," 10 December 2003; available from [http://www.cpa-iraq.org/cpa\\_documents.html](http://www.cpa-iraq.org/cpa_documents.html); Internet; accessed 21 January 2004; Coalition Provisional Authority, Regulation Number 8, "Delegation of Authority Regarding an Iraq Property Claims Commission," 14 January 2004; available from [http://www.cpa-iraq.org/cpa\\_documents.html](http://www.cpa-iraq.org/cpa_documents.html); Internet; accessed 21 January 2004; Coalition Provisional Authority, Order Number 55, "Delegation of Authority Regarding the Iraq Commission on Public Integrity," 28 January 2004; available from [http://www.cpa-iraq.org/cpa\\_documents.html](http://www.cpa-iraq.org/cpa_documents.html); Internet; accessed 4 March 2004; Coalition Provisional Authority, Memorandum Number 7, "Delegation of Authority under De-Baathification Order No. 1," 4 November 2003; available from [http://www.cpa-iraq.org/cpa\\_documents.html](http://www.cpa-iraq.org/cpa_documents.html); Internet; accessed 21 January 2004.

<sup>33</sup> A month after Bush and Blair's call for significant UN and international participation in Iraqi reconstruction, the Coalition presented the Security Council a draft resolution that, among other things, outlined in broad terms what the international community's "vital role" might include. Richard Boucher, Spokesman, U.S. Department of State, "Daily Press Briefing," Washington, D.C., 9 May 2003, transcript available from <http://www.state.gov/r/pa/prs/dpb/2003/20437.htm>; Internet; accessed 9 March 2004. After two weeks of debate of the Coalition's proposal, the Security Council adopted Resolution 1483. United Nations, UN Security Council Resolution 1483. The resolution confirmed the UN's resolve to play a vital role in the reconstruction of Iraq generally and in restoring the rule of law specifically. The resolution also called for the appointment of a UN Special Representative who would promote and coordinate international efforts to reestablish the rule of law. *Ibid.*, 5<sup>th</sup> and 7<sup>th</sup> preambular paragraphs and par. 8. In a meeting convened by the UN on June 25, 2003, representatives from the Iraqi legal community, the CPA, and the UN met and discussed transitional justice issues and UN representatives shared experiences in fostering judicial and legal reform in other settings. UN Report of 17 July, par. 54.

<sup>34</sup> In the summer of 2003, there were indications of a growing disagreement between Great Britain and the U.S. regarding the extent of international involvement in reconstruction. Andrew Buncombe, "US Seeks Troops for UN Force but Refuses to Cede Control," *Independent* (London), 22 August 2003, sec. A, p. 14 (646 words) [database on-line]; available from Westlaw; accessed 9 March 2004; Christopher Adams and Mark Turner, "UN Ready to Send Team to Prepare the Ground for Iraq Elections," *Financial Times* (London), 15 July 2003 (692 words) [database on-line]; available from Westlaw; accessed 9 March 2004.

<sup>35</sup> Colum Lynch and Rajiv Chandrasekaran, "Shiite Leader in Iraq Wants Help of U.N., Envoy Says," *Washington Post*, 17 March 2004, sec. A, p. 17.

<sup>36</sup> There was considerable debate and in-fighting about whether the State Department or Defense Department should take the lead role in post-war reconstruction, with the question of international participation figuring centrally in that debate. Robin Wright, "Administration Split Over Role of U.N. in Iraq; How Much Control Will U.S. Cede?" *Washington Post*, 18 February 2004, sec. A, p. 12 (1224 words) [database on-line]; available from Westlaw; accessed 4 March 2004.

The Defense Department generally sought to minimize international involvement. In a major address, the Secretary of Defense, Donald H. Rumsfeld, suggested that UN and other

international assistance in Iraq was not necessary and, in fact, could be counterproductive to Coalition objectives. He noted that in some past nation building scenarios “well intentioned foreigners arrive on the scene, look at the problem, say let’s go fix it for them and despite good intentions there can be unintended adverse side affects [sic].” As examples, Rumsfeld cited the impact to the local economy of East Timor from the presence of international workers and the fact that “four years after the war the United Nations still run Kosovo by executive fiat.” Secretary of Defense Donald H. Rumsfeld, “National Security for the 21st Century – National Power in an Unpredictable World,” (keynote address presented at the Eisenhower Series National Security Conference, Washington, D.C., 25 September 2003); transcript available from <http://www.dod.mil/transcripts/2003/tr20030925-secdef0712.html>; Internet; accessed 10 December 2003.

<sup>37</sup> United Nations, UN Security Council Resolution 1500, 14 August 2003, available from <http://daccess-ods.un.org/TMP/7699180.html>; Internet; accessed 9 March 2004.

<sup>38</sup> United Nations Secretariat, *Report of the Secretary-General pursuant to paragraph 24 of resolution 1483 and paragraph 12 of resolution 1511* (2003), 5 December 2003, par. 24; available from <http://daccess-ods.un.org/TMP/2187269.html>; Internet; accessed 21 January 2004 (hereafter cited as “UN Report of 5 December”).

<sup>39</sup> In the fall of 2003, the security situation in Iraq began to erode and Coalition forces suffered a growing number of casualties from an emboldened insurgency. As a result, domestic and international pressure began to mount on the Coalition to seek greater international involvement for both security and reconstruction. On October 16, 2003, the Security Council unanimously adopted Resolution 1511 which, among other things, invited the Governing Council, in coordination with the CPA, to provide a timetable for drafting a constitution and holding democratic elections and generally resolved that the UN “should strengthen its vital role in Iraq.” United Nations, UN Security Council Resolution 1511. On November 15, 2003, the CPA and Governing Council announced that they had reached an agreement to transfer the powers of administering Iraq from the CPA to a representative transitional national assembly by June 30, 2004. Rajiv Chandrasekaran, “Iraqis Say U.S. to Cede Power by Summer; Town Meetings to Set Process in Motion,” *Washington Post*, 15 November 2003, sec. A, p. 1 (1230 words) [database on-line]; available from Westlaw; accessed 23 January 2004. Representatives of the CPA and Governing Council expressed a desire for the UN to play an active role in the plan’s implementation. See UN Report of 5 December, par. 64. Given the timeline in the November agreement, however, the Secretary General noted that the UN would need to focus on political transition, although it would remain available to assist in other areas, such as promoting and institutionalizing the rule of law, provided that “the substance of the role allocated to the United Nations is proportionate to the risks [the United Nations] are being asked to take . . .”. Ibid., pars. 69, 76, 108, 112.

A long-anticipated meeting on January 19, 2004, was supposed to be the forum for the Coalition, Governing Council, and UN leadership to discuss specific roles for the UN and the international community in post-war Iraq. See UN Report of 5 December, par. 81. However, after Grand Ayatollah Ali Al-Sistani’s opposition to the proposed caucus method of selecting a transitional government, the only item on the agenda was the feasibility of early elections or other methods to transfer power. Hamza Hendawi, “Iraqis, Occupation Authorities Look to United Nations to Solve Political Impasse,” *Tampa Bay Online* 15 January 2004 [journal on-line]; available from <http://ap.tbo.com/ap/breaking/MGALQZNOGPD.html>; Internet; accessed 15 January 2004; Warren Hoge, “UN Pressed on Sending Team to Aid Iraq Vote; Annan Indicates

He Would Like to Help But Puts Off Decision,” *International Herald Tribune* (London), 20 January 2004, sec. A, p. 1 (970 words) [database on-line]; available from Westlaw; accessed 25 February 2004.

<sup>40</sup> Flanz, Shafik, and Boyle, 29.

<sup>41</sup> Richard C. Paddock, “An Awful Truth Sinks In,” *Los Angeles Times*, 5 December 2003, sec. A, p. 1 (2136 words) [database on-line]; available from Westlaw; accessed 5 December 2003; Human Rights Watch, “Iraq: Justice Needs International Role,” 15 July 2003; available from <http://www.hrw.org/press/2003/07/iraq071503.htm>; Internet; accessed 19 November 2003. Human Rights Watch, “Justice for Iraq: A Human Rights Watch Policy Paper,” December 2002; available from <http://www.hrw.org/backgrounder/mena/iraq1217bg.htm>; Internet; accessed 3 March 2004; Department of State, “War Crimes,” (Washington, D.C.: U.S. Department of State, International Information Programs, 1999); available from <http://usinfo.state.gov/regional/nea/iraq/iraq99h.htm>; Internet; accessed 13 January 2004; CPT R. Peter Masterton, “The Persian Gulf War Crimes Trials,” *The Army Lawyer*, June 1991 [database on-line]; available from Westlaw; accessed 3 March 2004.

<sup>42</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY), located in The Hague, Netherlands, was established by UN Security Council Resolution 827 on May 25, 1993, to prosecute serious violations of international law committed in the territory of the former Yugoslavia after 1991. There are twenty-five international permanent and *ad litem* trial judges. ICTY shares eighteen appellate judges with the International Tribunal for Rwanda. International Criminal Tribunal for the former Yugoslavia, “Fact Sheet on ICTY Proceedings,” 23 January 2004; available from <http://www.un.org/icty/glance/index.htm>; Internet; accessed 4 March 2004 (hereafter cited as “ICTY Fact Sheet”).

The International Criminal Tribunal for Rwanda (ICTR), located in Arusha, Republic of Tanzania, was established by UN Security Council Resolution 955 on November 8, 1994, to prosecute persons responsible for serious violations of international humanitarian law committed by Rwandans in and around Rwanda during 1994. International Criminal Tribunal for Rwanda, “General Information About the Tribunal”; available from <http://ictt.org/ENGLISH/geninfo/intro.htm>; Internet; accessed 4 March 2004.

<sup>43</sup> The Special Court for Sierra Leone was established by agreement between the UN and the Government of Sierra Leone on January 16, 2002, to try those violating the most serious national and international laws since November 30, 1996. The court's Trial Chamber consists of three judges, one appointed by the Government of Sierra Leone, and two appointed by the UN Secretary General. The Appeals Chamber consists of five judges, two appointed by the Government of Sierra Leone and three by the Secretary General. See United Nations and Government of Sierra Leone, “Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone,” 16 January 2002; available from <http://www.sierra-leone.org/specialcourt/agreement.html>; Internet; accessed 4 March 2004.

<sup>44</sup> Jessica Martin, “‘Iraqi Special Tribunal’ a Mistake Says International Law Expert,” *Washington University News and Information* 16 December 2003 [journal on-line]; available from <http://news-info.wustl.edu/news/page/normal/603.html>; Internet; accessed 16 January 2004; Human Rights Watch, “Iraq: Justice Needs International Role”; Kenneth Roth, “Show Trials are Not the Solution to Saddam’s Heinous Reign,” *Globe and Mail* (Toronto), 18 July

2003, sec. A, p. 13 (855 words) [database on-line]; available from Westlaw; accessed 19 November 2003.

Although generally unstated, another principal reason the "internationalist" lobby opposes local Iraqi trials is the availability of the death penalty under Iraqi law. Although the CPA has suspended capital punishment, see Coalition Provisional Authority, Order Number 7, sec. 3, it is widely anticipated that upon the CPA's relinquishment of administrative authority in July 2004, the incoming Iraqi transitional administration will reinstate the death penalty as an authorized punishment for certain offenses. Carol J. Williams, "Iraq Sets Up War Crimes Court," *Los Angeles Times*, 11 December 2003, sec. A, p. 11; available from <https://www.us.army.mil/portal/jhtml/earlyBird/Dec2003/e20031211240486.html>; Internet; accessed 11 December 2003.

<sup>45</sup> It is universally accepted that prosecuting Ba'athist criminals in the newly-created International Criminal Court (ICC) in The Hague is not a viable option because the ICC only has jurisdiction over crimes committed after July 1, 2002, the date of its creation. Diane F. Orentlicher, "Venues for Prosecuting Saddam Hussein: The Legal Framework," *American Society of International Law* December 2003 [journal on-line]; available from <http://www.asil.org/insights/insigh124.htm>; Internet; accessed 23 January 2004.

<sup>46</sup> See Edith M. Lederer, "New Iraqi War Crimes Tribunal Ironically Emulates International Court US Opposes," *Global Policy Forum* 20 December 2003 [journal on-line]; available from <http://www.globalpolicy.org/intljustice/general/2003/1220ironic.htm>; Internet; accessed 16 January 2004.

<sup>47</sup> Although the report of the U.S. Department of Justice-led Judicial Assessment Team (JAT) was not publicly released, it reportedly called into question the competence and impartiality of sitting Iraqi jurists. Rajiv Chandrasekaran, "Rights Court Run by Iraqis is Approved by Council," *Washington Post*, 10 December 2003, sec. A, p. 1 (1429 words) [database on-line]; available from Westlaw; accessed 20 December 2003. The ability of the JAT to adequately evaluate the capabilities of Iraqi judges has itself been called into question. Cherif Bassiouni, "The New Iraq: Online NewsHour Special Report," interview with Gwen Ifill, (May 13, 2003), transcript available from [http://www.pbs.org/newshour/bb/middle\\_east/jan-june03/iraq\\_05-13.html](http://www.pbs.org/newshour/bb/middle_east/jan-june03/iraq_05-13.html); Internet; accessed 13 January 2004.

<sup>48</sup> James Kitfield, Sydney J. Freedberg, Jr., and Corine Hegland, "A Tyrant's Trial," *National Journal*, 20 December 2003, (2994 words) [database on-line]; available from Westlaw; accessed 20 December 2003; Paul Ohia, "US Trains 100 Lawyers to Try Saddam," *This Day News* 19 December 2003 [journal on-line]; available from <http://www.thisdayonline.com/news/20031219news04.html>; Internet; accessed 19 December 2003; Williams, "Iraq Sets up War Crimes Court"; Niko Price, "Officials Expect Iraq Tribunal Soon; Iraqi Judges Would Hear Testimony on War Crimes," *Tallahassee Democrat*, 6 December 2003, sec. A, p. 1 (1213 words), [database on-line]; available from Westlaw; accessed 20 December 2003.

<sup>49</sup> Coalition Provisional Authority, Order Number 48. The question of whether the CPA, as an interim occupying power, had legal authority to authorize the creation of the IST will be moot since it is unlikely any IST trials will occur until well after the transfer of authority on June 30, 2004.

<sup>50</sup> Ibid., secs. 1(4), 2(2), and 2(4).

<sup>51</sup> Governing Council of Iraq, *The Statute of the Iraqi Special Tribunal*, 10 December 2003; available from [http://www.cpa-iraq.org/audio/20031210\\_Dec10\\_Special\\_Tribunal.htm](http://www.cpa-iraq.org/audio/20031210_Dec10_Special_Tribunal.htm); Internet; accessed 16 January 2004 (hereafter cited as "IST Statute").

<sup>52</sup> Ibid., sec. I, pt. 1, art. 1(b); sec. III, pt. 1, art. 10; sec. III, pt. 5, art. 14; sec. IV, art. 15(c); sec. VI, art. 17(d).

<sup>53</sup> Ibid., sec. I, pt. 3, art. 4(b); sec. I, pt. 3, art. 4(c); sec. I, pt. 6, art. 7; sec. II, pt. 1, art. 8; sec. V, art. 16; sec. VIII, art. 23(b); sec. IX, pt. I, art. 25 (although the statute does not expressly provide, presumably appellate decisions are made by a simple majority).

<sup>54</sup> See *ibid.*, sec. I, pt. 3, art. 4(d). But see, sec. XI, art. 28, which states that judges "shall be Iraqi nationals." This contradiction was apparently the result of a last-minute compromise which added the language in Article 4(d), but failed to make the conforming change to Article 28. Anthony Dworkin, "Saddam Hussein and Iraq's War Crimes Tribunal," *Crimes of War Project*, 21 December 2003; available from <http://www.crimesofwar.org/onnews/news-saddam1.html>; Internet; accessed 25 February 2004.

<sup>55</sup> IST Statute, sec. I, pt. 3, art. 4(d); sec. I, pt. 5, art. 6(b); sec. I, pt. 6, art. 7(n); sec. II, pt. 1, art. 8(j). On March 6, 2004, the U.S. Department of Justice announced that it was sending a team of about fifty experts to work in the newly-formed Regime Crimes Adviser's Office. Although reportedly the team would include investigators and legal experts from other countries, there was no indication how many or from where these additional experts would come. Nor does it appear that the UN or other international organizations have been asked to assist in identifying potential observers and advisers. Dan Eggen, "U.S. Legal Team to Aid In Any Trial of Hussein; Group to Assist Iraqis in Building Case," *Washington Post*, 7 March 2004, sec. A, p. 20.

<sup>56</sup> IST Statute, sec. VII, art. 18(c).

<sup>57</sup> Department of State, International Information Programs, "War Crimes"; Human Rights Watch, "Bureaucracy of Repression: The Iraqi Government in its Own Words," February 1994, available from <http://www.hrw.org/reports/1994/iraq/>; Internet; accessed 13 January 2004. Human Rights Watch, "Genocide in Iraq: The Anfal Campaign Against the Kurds," July 1993, available from <http://www.hrw.org/reports/1993/iraqanfal/>; Internet; accessed 13 January 2004; Human Rights Watch, "Chemical Ali" in His Own Words: The Ali Hassan Al-Majid Tapes," July 1993, available from <http://www.hrw.org/reports/1993/iraqanfal/APPENDIXA.htm>; Internet; accessed 13 January 2004; Human Rights Watch, "Endless Torment: The 1991 Uprising in Iraq and its Aftermath," June 1992, available from <http://www.hrw.org/reports/1992/Iraq926.htm>; Internet; accessed 13 January 2004.

<sup>58</sup> These include, among others, citizens of Kuwait, Iran, and Israel and members of the Coalition forces from several nations who served in Operation Desert Storm.

<sup>59</sup> See Dworkin, "Saddam Hussein and Iraq's War Crimes Tribunal." See also Judy Aita, "Iraqi Jurists Plan for Return to Rule of Law," *Washington File*, 20 May 2003 [journal on-line]; available from <http://usembassy-australia.state.gov/hyper/2003/0520/epf214.htm>; Internet; accessed 13 January 2004.

<sup>60</sup> For example, between its inception in 1993 and 2003, the International Criminal Tribunal for the former Yugoslavia spent over \$922 million and completed only 35 cases. See ICTY Fact Sheet.

<sup>61</sup> IST Statute, sec. XI, art. 35.

<sup>62</sup> See Human Rights Watch, "Iraq: Flawed Tribunal Not Entitled to U.N. Legitimacy," 16 January 2004; available from <http://hrw.org/english/docs/2004/01/15/iraq6942.htm>; Internet; accessed 3 March 2004.

<sup>63</sup> IDPs are "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border." United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *Guiding Principles on Internal Displacement*, 1998, available from [http://www.reliefweb.int/ocha\\_ol/pub/idp\\_gp/idp.html](http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html); Internet; accessed 19 November 2003. IDPs are distinguished from refugees in that IDP relocation takes place within national borders. Of course, groups or individuals who move voluntarily for social, economic, or cultural reasons are not considered IDPs.

<sup>64</sup> John Fawcett and Victor Tanner, *The Internally Displaced People of Iraq* (Washington, D.C.: The Brookings Institution-SAIS Project on Internal Displacement, 2002), 1; available from <http://www.brookings.edu/fp/projects/idp/articles/iraqreport.htm>; Internet; accessed 1 October 2003.

<sup>65</sup> Ibid., 9.

<sup>66</sup> Ibid., 10.

<sup>67</sup> Ibid., 10-11. Armed in-fighting among the two main Kurdish factions, the Kurdistan Democratic Party (KDP) led by Massoud Barzani and the Patriotic Union of Kurdistan (PUK) led by Jalal Talabani, also resulted in thousands of displaced Kurds between 1994 and 2002. Ibid., 13.

<sup>68</sup> Ibid., 11-13. Under Saddam's Arabization program, a variety of tactics, including violence, were used to coerce the departure of ethnic minorities and a variety of inducements offered to Arabs to occupy the vacated properties. In some cases, non-Arabs were afforded the option of completing a declaration "correcting" their ethnic identity to Arab, although even these "re-designated" Arabs did not always avoid displacement.

<sup>69</sup> Ibid., 28-33.

<sup>70</sup> Ibid., 30-31.

<sup>71</sup> Nyier Abdou, "Playing for Keeps," *Al-Ahrman Weekly On-Line* 26 June – 2 July 2003 [journal on-line]; available from <http://weekly.ahram.org.eg/2003/644/re4.htm>; Internet; accessed 27 February 2004.

<sup>72</sup> See Agence France-Presse, "Coalition Setting Up Body to Settle Increasing Property Disputes in Iraq," 21 May 2003 (139 words) [database on-line]; available from Westlaw; accessed 27 February 2004. Under this policy, Coalition personnel were prohibited from adjudicating or attempting to mediate property disputes, although they were authorized to detain individuals who attempted to use force to reoccupy property. Pending the establishment of legal processes, military officials were to direct putative claimants to preserve documents and seek temporary shelter with relatives or in shelters provided by humanitarian agencies.

<sup>73</sup> Paul Watson, "U.S. Evicts Kurds from Arab Homes; Owners Fled Siege of Mosul," *Chicago Tribune*, 7 May 2003, p. 8 (363 words) [database on-line]; available from Westlaw; accessed 27 February 2004.

<sup>74</sup> Norwegian Refugee Council, "Iraq: Return of Evicted Kurds Causes New Displacements," *Global IDP Project*, 19 February 2004, 3; available from <http://www.db.idpproject.org/Sites/idpSurvey.nsf/w/ViewSingleEnv/IraqProfile+Summary>; Internet; accessed 24 February 2004.

<sup>75</sup> *Ibid.*, 3-4.

<sup>76</sup> Earlier, in June 2003, the CPA established the Iraqi Property Reconciliation Facility (IPRF) as an interim measure designed to receive and facilitate the voluntary resolution of property claims in cases where there were no real disputes. Coalition Provisional Authority, Regulation Number 4, "Establishment of the Iraqi Property Reconciliation Facility," 26 June 2003; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 19 November 2003. The CPA partnered with the International Organisation for Migration to establish several regional centers; however, because of deteriorating security conditions in many areas in the fall of 2003 and the lack of incentives to voluntarily resolve claims, the IPRF failed to achieve the hoped-for results in settling claims. Stephen Lennon, Senior Program Adviser, International Organisation for Migration, interview by author, 22 December 2003, Washington, D.C.

<sup>77</sup> Coalition Provisional Authority, Order Number 50, "The Ministry of Displacement and Migration," 11 January 2004; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 16 January 2004.

<sup>78</sup> Coalition Provisional Authority, Regulation Number 8 and Annex.

<sup>79</sup> *Ibid.*, Annex, sec. 2, art. 3B.

<sup>80</sup> *Ibid.*, Annex, sec. 4, art. 8.

<sup>81</sup> *Ibid.*, Annex, sec. 5, art. 10.

<sup>82</sup> *Ibid.*, Annex, sec. 5, arts. 11 and 14.

<sup>83</sup> The so-called Oil-for-Food Program was created by Security Council resolution in 1995. United Nations, UN Security Council Resolution 986, 14 April 1995, available from <http://daccess-ods.un.org/TMP/4008150.html>; Internet; accessed 19 November 2003. Under the program, a portion of oil revenues went directly to the UN to finance humanitarian relief efforts, including the funding of several studies, surveys, and other work with IDPs. See UN

Centre for Human Settlements (Habitat), Rehabilitation in Northern Iraq Program, "IDP Site and Family Survey Final Report," January 2001; available from <http://www.unchs.org/iraq/documents.asp>; Internet; accessed 25 February 2004; UN Centre for Human Settlements (Habitat), "Three-Year Plan, Settlement Rehabilitation Sector in Northern Iraq 2003-2005," December 2002; available from <http://www.unchs.org/iraq/documents.asp>; Internet, accessed 25 February 2004; Fawcett and Tanner, 32, 34-35. See also International Organisation for Migration, "IOM Press Briefing Notes: Iraq," 22 August 2003; available from <http://www.reliefweb.int/w/rwb.nsf/3a81e21068ec1871c1256633003c1c6f/8f4c8f1b411c5eacc1256d8a003050cd>; Internet; accessed 19 December 2003.

<sup>84</sup> Lennon interview.

<sup>85</sup> See UN Office of Humanitarian Coordinator for Iraq, "Iraq Crisis Update," 10 October 2003; available from [http://www.hiciraq.org/download/Iraq\\_Crisis\\_Update\\_10\\_October.zip](http://www.hiciraq.org/download/Iraq_Crisis_Update_10_October.zip); Internet; accessed 19 November 2003.

<sup>86</sup> The HPD and HPCC were created in early 2000 and the deadline for filing claims with the HPD was July 1, 2003. United Nations Interim Administration Mission in Kosovo (UNMIK) Housing and Property Directorate/Housing and Property Claims Commission, "HPD in 2003 – Annual Report"; available from <http://www.hpdkosovo.org/About%20Us%20.htm>; Internet; accessed 2 March 2004.

<sup>87</sup> For example, in Kosovo, some potential claimants were displaced as a result of discriminatory policies of the former regime, others fled to avoid hostilities, and others arguably "voluntarily" left properties in exchange for some compensation. Also, in Kosovo, many land records had been destroyed or looted and there were many informal, unrecorded land transactions. See *ibid.* Similar issues exist in post-conflict Iraq.

<sup>88</sup> An argument can be made that the UN's property resolution experiences in Kosovo provide a poor model since the disposition of claims has been unacceptably slow. In the three years since their creation, HPD and HPCC have resolved only 42% of the nearly 29,000 claims filed. *Ibid.* However, HPD and HPCC have carefully studied and reported on the causes for their backlogs and have developed solutions. The identified causes for delays in Kosovo included, among other things, the failure to quickly adopt and publish procedural guidance on the process, inadequate funding, the lack of a process to resolve jurisdictional disputes between the HPCC and the regular courts, a lack of linkage between the claims resolution process and the timelines for returning and resettling IDPs and refugees, and the need for land management reforms to occur in conjunction with the claims process. *Ibid.* Since similar issues may be encountered in Iraq, the IPCC should be anxious to review the problems and solutions developed in Kosovo.

<sup>89</sup> Coalition Provisional Authority, Regulation Number 8, sec. 2(c).

<sup>90</sup> The UN is on record as offering specific assistance in the property claims resolution process. On May 16, 2003, the Secretary-General's Special Representative on Internally Displaced Persons, suggested that "[t]o help these diverse groups better manage their returns and their competing land and property claims, the United Nations should be requested to assist, given its experience in this area. It could provide objective advice and assistance with return and help set up effective claims commissions to adjudicate property disputes." United Nations Office of the High Commissioner for Human Rights, "UN Representative Calls for Action on

Displaced Persons in Iraq," 16 May 2003; available from <http://www.un.org/news/Press/docs/2003/hr4666.doc.htm>; Internet; accessed 19 November 2003. The Secretary General has indicated the UN will return to Iraq when "the substance of the role allocated to the United Nations is proportionate to the risks we are being asked to take . . .". UN Report of 5 December, par. 112.

<sup>91</sup> Farangis Najibullah, "Iraq: What Does a Postwar Future Hold for the Ba'ath Party?" 12 March 2003; available from <http://www.rferl.org/features/2003/03/12032003171720.asp>; Internet; accessed 5 March 2004. Milton Viorst, "It's Not Over Until Saddam Is Over," *Washington Post*, 27 July 2003, sec. B, p. 4 (1072 words) [database on-line]; available from Westlaw; accessed 5 March 2004.

<sup>92</sup> There have been numerous reports of revenge killings and other reprisals against former high and even low-ranking members of the Ba'ath Party since the collapse of Saddam's regime. United Kingdom Home Office, *Iraq Bulletin 3A/2003* (London: Immigration & Nationality Directorate, July 2003); available from <http://194.203.40.90/default.asp?PageId=4217>; accessed 5 March 2004. Hamza Hendawi, "Iraq Announces Details of Uprooting Baathists, Promises Evenhanded Approach," *Associated Press Newswires*, 11 January 2004 (790 words); [database on-line]; available from Westlaw; accessed 13 January 2004.

<sup>93</sup> Ibid.; U.S. Senate Committee on Foreign Relations, *Iraq: Meeting the Challenge, Sharing the Burden, Staying the Course*, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess., Senate Print 108-31, July 2003, 9.

<sup>94</sup> Compare the CPA's orders and memoranda discussed below with Control Council and Coordinating Committee of the Allied Control Authority, Directive Number 24, "Removal From Office and From Positions of Responsibility of Nazis and of Persons Hostile to Allied Purposes," 12 January 1946; available from [http://www.loc.gov/rr/frd/Military\\_Law/enactments-home.html](http://www.loc.gov/rr/frd/Military_Law/enactments-home.html); Internet; accessed 13 January 2004. Under de-Nazification, among other things, former members of the Nazi Party who had been "more than nominal participants" in the activities of the Party were removed and excluded from public office, semi-public office, and positions of responsibility in the private sector. Ibid., par. 1. In many enumerated cases, removal was mandatory. Ibid., par. 10. However, the Occupation Authorities recognized that "there is a mass of Germans, the extent and quality of whose association and participation [with the Nazi Party], as well as their past and present motives, are in doubt . . .". Ibid., par. 6. Following investigation, Occupation officials had discretion to remove these individuals or not. Ibid., pars. 11-12.

<sup>95</sup> Four days earlier, Coalition Forces Commander GEN Tommy R. Franks had already dissolved the Party. Xinhua News Agency, "US Dissolves Iraq's Baath Party," *XINHUA Online*, 11 May 2003 (228 words) [database on-line]; available from Westlaw; accessed 13 January 2004; Richard K. Brunner, "Iraq War's Fast-Food Menu Results in Long-Term Nausea," *Allentown (PA) Morning Call*, 24 June 2003, sec. A, p. 11 (773 words) [database on-line]; available from Westlaw; accessed 13 January 2004.

<sup>96</sup> The Ba'ath Party in Iraq was organized in a hierarchy of ranks. Below the national leadership's Regional Command ("Qutriyya") were "full members" of the Party associated with the Central Bureau ("Maktab Markazi"), Branches ("Fara"), Sections ("Shu'bah"), and Team ("Firqah"). Members in these ranks were designated as "Senior Members" by the CPA. Also among the estimated 15,000 to 50,000 "full members" of the Party were the "Udw Amil" (Active Member) and "Udw" (Member). Before being admitted into full membership, most candidates were required serve a one to two-year waiting period as Sympathizers, an additional one to two-

year period as Supporters, and a final 6 month to one-year period as Candidate Members. See Coalition Provisional Authority, Order Number 1, "De-Baathification of Iraqi Society," 16 May 2003, par. 2; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 16 January 2004; Viorst, "It's Not Over Until Saddam Is Over"; Sam Dagher, "Iraq Governing Council Details Plan to Root Out Baath Members," *Agence France Presse*, 11 January 2004 (678 words) [database on-line]; available from Westlaw; accessed 14 January 2004.

<sup>97</sup> Coalition Provisional Authority, Order Number 1, pars. 2, 3, and 6.

On May 25, 2003, the CPA issued two additional orders in support of the process of De-Ba'athification. One directed the forfeiture and seizure of all Party assets and property, to be held in trust by the CPA for the use and benefit of the Iraqi people. The order established criminal penalties for failure to relinquish Ba'athist assets. The second created the Iraqi De-Ba'athification Council (IDC), composed entirely of Iraqi nationals, tasked with investigating and advising the CPA regarding individual Ba'ath members and making recommendations for exceptions to removal actions. Coalition Provisional Authority, Order Number 4, "Management of Property and Assets of the Iraqi Baath Party," 25 May 2003; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 16 January 2004. Coalition Provisional Authority, Order Number 5, "Establishment of the Iraqi De-Baathification Council," 25 May 2003; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 16 January 2004.

On June 3, 2003, in order to accelerate the process of vetting possible former Ba'ath officials, the CPA issued instructions to the Coalition Forces Commander, authorizing him to create Accreditation Review Committees to investigate and determine Ba'ath affiliation of local officials. The memorandum authorized individuals to appeal a finding regarding their status in the Ba'ath Party and announced the criteria against which requests for exceptions would be evaluated by the CPA. Among other things, the CPA would consider the individual's level of membership, whether the official was deemed indispensable in the short term to the operation of local government, why the person had joined the Party, and whether the individual held the support of colleagues and the respect of subordinates. Coalition Provisional Authority, Memorandum Number 1, "Implementation of De-Baathification Order No. 1," 3 June 2003; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 16 January 2004.

<sup>98</sup> Coalition Provisional Authority, Memorandum Number 7, "Delegation of Authority Under De-Baathification Order No. 1," 4 November 2003; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 16 January 2004.

<sup>99</sup> Dagher, "Iraq Governing Council Details Plan." Most recently, the CPA announced that senior Ba'ath party members are ineligible to run for public elective offices. Coalition Provisional Authority, Order Number 62, "Disqualification from Public Office," 26 February 2004; available from <http://www.cpa-iraq.org/regulations/index.html>; Internet; accessed 2 March 2004.

<sup>100</sup> As Ahmad Chalabi, member of the Governing Council and Chairman of the Supreme National Commission for De-Ba'athification, poignantly noted, "How can you reconcile those laying dead in mass graves with those who killed them?" Hendawi, "Iraq Announces Details of Uprooting."

<sup>101</sup> At a minimum, the CPA and Governing Council should publicly announce that plans for reconciliation and eventual reintegration of former Ba'athists are being considered. Otherwise, thousands of former Ba'athists will see little hope and opportunity for them in the "new Iraq." The Coalition paid a painful price for the CPA's precipitous order dissolving the Iraqi military, as rioting by unemployed career soldiers erupted across the country. See John Sullivan, "5 U.S. Soldiers Hurt in Iraqi Street Fights," *Philadelphia Inquirer*, 14 June 2003, sec. A, p. 3 (441 words) [database on-line]; available from Westlaw; accessed 11 Marcy 2004 (Mosul riots); Dan Murphy, "Jobless Soldiers Fuel Anti-US Riots in Iraq; Baghdad, Basra, and Bayji Have Been the Scenes of Unrest and Rioting in Recent Days," *Christian Science Monitor*, 8 October 2003, sec. A, p. 7 (1074 words); available from Westlaw; accessed 11 March 2004. Officials should have learned that alienating large segments of the population without offering them any future in the "new Iraq" invariably leads to violence and instability. Like the former soldiers, former Ba'athists may be particularly vulnerable to recruitment by insurgents and subversive elements looking to swell their rolls with disaffected Iraqis.

<sup>102</sup> Perito, 7.

<sup>103</sup> See Trevor Avruch and Beatriz Vejarano, "Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography," *Online Journal of Peace and Conflict Resolution*, Spring 2002 [journal on-line]; available from [http://www.trinstitute.org/ojpcr/4\\_2recon.htm](http://www.trinstitute.org/ojpcr/4_2recon.htm); Internet; accessed 14 January 2004.

<sup>104</sup> The Working Group, operating under the State Department's Future of Iraq Project, began consultations in July 2002. A number of international experts were included in consultations and conferences. Their efforts culminated in March 2003 with the publication of a comprehensive "blueprint" for action in post-conflict Iraq. The report focused on institutional reform, legal reform, and truth, accountability, and reconciliation, and included specific recommendations and draft legislation to implement the recommendations. United States Institute for Peace, "Establishing Justice and the Rule of Law in Iraq: A Blueprint for Action," 1 August 2003; available from [http://www.usip.org/events/2003/0801\\_ESIraqLaw.html](http://www.usip.org/events/2003/0801_ESIraqLaw.html); Internet; accessed 27 January 2004.

<sup>105</sup> According to one press report, CPA officials are "unsure what happened to the Future of Iraq Project and the expertise it generated" and suggest the products became victims in a "bitter turf fight" between the State Department and Defense Department. Stephen J. Glain, "Chaos Thrives in Baghdad Despite Prewar Planning: Iraqis Frustrated, Criticize US-Led Reconstruction," *Boston Globe*, 10 June 2003, sec. A, p. 20 (1260 words) [database on-line]; available from Westlaw; accessed 27 January 2004. See also Robert Adamson and Andras Vamos-Goldman, "Internationalization of Post-Conflict Justice in Iraq: Ensuring a Role for the United Nations and International Justice," *LIU Institute for Global Issues*, (July 2003): 4. Jonathan S. Landay and Warren P. Strobel, "Officials Had No Plan B for Postwar Iraq," *Pittsburgh Post-Gazette*, 13 July 2003, sec. A, p. 6 (1491 words) [database on-line]; available from Westlaw; accessed 13 January 2004. Cherif Bassiouni, "The New Iraq."

<sup>106</sup> Blueprint, 6, 12-13.

<sup>107</sup> Ibid., 6, 35-36.

<sup>108</sup> Ibid., 6-7, 36.

<sup>109</sup> Ibid., 7, 13, 35.

<sup>110</sup> One study suggested that the reason many reconciliation processes have failed is that they have borrowed previous models and failed to account for cultural differences. See Avruch and Vejarano.

<sup>111</sup> Ibid.

<sup>112</sup> The Security Council recently sponsored a series of meetings to gather best practices and lessons learned to improve the UN's capacity to assist nations pursuing post-conflict reconciliation. See United Nations Security Council, "In Presidential Statement, Security Council Reaffirms 'Vital Importance' of United Nations' Role in Post-Conflict Reconciliation," 26 January 2004; available from <http://www.un.org/News/Press/docs/2004/sc7990.doc.htm>; Internet; accessed 11 March 2004.

<sup>113</sup> High Representative Paddy Ashdown, "What I Learned in Bosnia," UN Office of the High Representative Press Office, 28 October 2002; available from [http://www.ohr.int/ohr-dept/presso/presa/default.asp?content\\_id=28294](http://www.ohr.int/ohr-dept/presso/presa/default.asp?content_id=28294); accessed 11 March 2004.

<sup>114</sup> Anthony Cordesman, *Iraq: Too Uncertain to Call*, (Washington, D.C.: Center for Strategic and International Studies, 14 November 2003), 16; available from <http://www.csis.org/features/031114toouncertain.pdf>; Internet; accessed 11 March 2004.

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